Dajejarhi Sdn Bhd v MKRS Group (M) Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22 NCvC-956–08 OF 2012
YEOH WEE SIAM J
16 APRIL 2014

Contract — Agreement — Breach — Contractor appointed subcontractor to supply offshore scaffolding services for installation — Subcontractor erected scaffolding which was more than contractual estimate size — Allegation that additional works were result of modification — Whether agreed by contractor — Payment already made when difference in scaffolding discovered — Whether amount overpaid — Whether there was misrepresentation by subcontractor — Whether additional works carried out by subcontractor were agreed upon by parties

The present case involved a project where Ranhill Worley Sdn Bhd ('Ranhill') was the main contractor for the project. Ranhill, in turn appointed Maser Marine Engineering as its subcontractor for the project and MME then appointed the plaintiff as its subcontractor. The plaintiff then appointed the first defendant ('D1') as one of its subcontractors to supply offshore scaffolding services for the installation of tubes and cables at the utility platform. It was the plaintiff's case that D1 erected 400m of scaffolding which was more than the contractual estimate of +/-200 m . D1 alleged that it had erected 2,000m of scaffoldings (original estimate of 400m3 + additional 1,600m). D1 contended that the additional works were as a result of modification and this was agreed upon with the plaintiff as part of the variation orders ('VOS'). When the plaintiff became aware that D1 did not erect the 2,000m scaffoldings as alleged, the plaintiff had already paid out to D1 a total sum of RM317,850. The plaintiff contended that the overpaid amount of RM217,850 was paid out based on the defendants' representations that they had erected a 2,000m scaffold structure. In the present action, the plaintiff sought, inter alia, for a refund of the sum of RM206,327.90 and general damages against D1 and the second defendant ('D2') for fraudulent and false misrepresentation. The issues to be decided by the court were what were the agreed terms of contract entered into by the parties; whether the additional works carried out by D1 were agreed upon by both parties; and whether the plaintiff's claim and D1's counterclaim could be allowed.

Held, allowing the claim and dismissing the counterclaim with costs:

(1) The communications between the parties and their conduct must be considered in the light of the express term in the PO that 'no prior or

subsequent representations or agreements, whether verbal or in writing by the seller ... shall be applicable or binding on the buyer unless expressly agreed by the buyer in writing' and 'no alteration shall be made thereto without the prior written consent of the buyer'. In the absence of any written consent or agreement by the plaintiff of the additional works done by D1, the plaintiff's claim ought to be allowed, and the defendant's counterclaim ought to be dismissed (see paras 53–54).

(2) The expert report by the plaintiff ('Neil Sharpe') showed that with the likely erection time required to build each of the Scaffold Cases, it was impossible to build a structure of 2,000m within that limited time and with the resources. A structure of this significance would require 406 hours and 16 minutes or approximately 16 days to complete. D1 did not call any independent expert to give evidence on its behalf but merely depended on the evidence of D2. Contrary to what Neil Sharpe had concluded, D2 stated that he was able to build the scaffold with his materials. He contended that it is humanly possible with the manpower of 12 scaffolders to erect 2,000m in the 12 hours at the platform by using his erection method or technique. In the absence of an expert report being adduced by the defendants, the court accepted the plaintiff's expert report prepared by Neil Sharpe. D2's evidence was highly inconsistent with contemporaneous documents (see paras 79–89).

(3) It is not credible that the defendants were able to come up with a design which was technically complex for such a huge structure within minutes when D2 arrived at the platform. The court did not accept the defendants' version of events that D1 had erected and completed the huge and complex structure of 10m x 10m x 10m within 12 hours with 12 scaffolders. Even with the lowest astronomical tide level of 9.5 metres, the 10m x 10m x 10m structure beneath the platform, if erected, would have submerged into the water (see paras 94, 97–98).

(4) The court accepted the plaintiff's submission that the sum of RM217,850 was paid by the plaintiff for works that did not exist and/or were not carried out by D1. The consideration for those works had wholly failed and D1 has unjustly enriched itself to that sum for works it did not execute. The plaintiff was entitled to the repayment of the monies paid out to D1 less the amount of labour charges of RM11,522.10 which was owed to D1. On a balance of probabilities, the plaintiff had proved its claim against the defendants. However, D1 has failed to prove its counterclaim against the plaintiff (see paras 105, 107–108).

[Bahasa Malaysia summary

Kes ini melibatkan projek di mana Ranhill Worley Sdn Bhd ('Ranhill') adalah kontraktor utama bagi projek tersebut. Ranhill, seterusnya melantik Maser Marine Engineering ('MME') sebagai subkontraktor untuk projek dan MME

kemudian melantik plaintif sebagai subkontraktornya. Plaintif kemudian melantik defendan pertama ('D1') sebagai salah satu subkontraktor untuk membekalkan perkhidmatan perancah luar pesisir untuk pemasangan tiub dan kabel di platform utiliti itu. Adalah kes plaintif bahawa D1 mendirikan 400m perancah yang lebih daripada anggaran kontrak +/- 200m . D1 mendakwa bahawa ia telah didirikan 2,000m daripada perancah ('anggaran asal 400m + tambahan 1,600m). D1 menegaskan bahawa kerja-kerja tambahan adalah hasil daripada pengubahsuaian dan ini telah dipersetujui dengan plaintif sebagai sebahagian daripada pesanan variasi ('VOS'). Apabila plaintif menyedari bahawa D1 tidak mendirikan 2,000m perancah seperti yang didakwa, plaintif telah membayar kepada D1 sejumlah RM317,850. Plaintif berhujah bahawa jumlah yang terlebih bayar daripada RM217,850 telah dibayar berdasarkan perwakilan defendan bahawa mereka telah mendirikan sebuah 2,000m struktur perancah. Dalam tindakan ini, plaintif memohon, antara lain, bayaran balik sejumlah RM206,327.90 dan ganti rugi am terhadap D1 dan defendan kedua ('D2') untuk salah nyata fraud dan pemalsuan. Isu-isu yang perlu diputuskan oleh mahkamah adalah terma dipersetujui bagi kontrak yang dimasuki oleh pihak-pihak; sama ada kerja-kerja tambahan yang dijalankan oleh D1 telah dipersetujui oleh kedua-dua pihak; dan sama ada tuntutan plaintif dan tuntutan balas D1 boleh dibenarkan.

Diputuskan, membenarkan tuntutan dan menolak tuntutan balas dengan kos:

(1) Komunikasi antara pihak-pihak dan tindakan mereka perlu dipertimbangkan berdasarkan istilah nyata di pesanan belian ('PB') bahawa 'no prior or subsequent representations or agreements, whether verbal or in writing by the seller ... shall be applicable or binding on the buyer unless expressly agreed by the buyer in writing' and 'no alteration shall be made thereto without the prior written consent of the buyer'. Dalam ketiadaan persetujuan bertulis atau perjanjian oleh plaintif daripada kerja-kerja tambahan yang dilakukan oleh D1, tuntutan plaintif patut dibenarkan dan tuntutan balas defendan harus ditolak (lihat perenggan 53–54).

(2) Laporan pakar oleh plaintif ('Neil Sharpe') yang menunjukkan bahawa dengan masa ereksi yang mungkin diperlukan untuk membina pelantar perancah, adalah mustahil untuk membina struktur 2,000m dalam masa yang terhad dan dengan sumber-sumber yang ada. Struktur penting ini memerlukan 406 jam dan 16 minit atau kira-kira 16 hari untuk disiapkan. D1 tidak memanggil mana-mana pakar bebas untuk memberikan keterangan bagi pihak, tetapi hanya semata-mata bergantung kepada keterangan D2. Bertentangan dengan kesimpulan yang dibuat oleh Neil Sharpe, D2 menyatakan bahawa dia mampu untuk membina perancah dengan materialnya. Ia mendakwa bahawa ia adalah mungkin dengan tenaga kerja 12 orang pembina perancah mendirikan

2,000m dalam tempoh 12 jam di atas platform dengan menggunakan kaedah pembinaan atau tekniknya. Jika tiada laporan pakar yang dikemukakan oleh defendan, mahkamah menerima laporan pakar plaintif yang disediakan oleh Neil Sharpe. Keterangan D2 adalah sangat tidak konsisten dengan dokumen semasa (lihat perenggan 79–89).

(3) Ia tidak boleh dipercayai bahawa defendan dapat membuat reka bentuk yang kompleks dari segi teknikal bagi struktur yang besar sebegitu dalam masa yang singkat apabila D2 tiba di platform. Mahkamah tidak menerima peristiwa versi defendan bahawa D1 telah mendirikan dan menyiapkan struktur yang besar dan kompleks 10m x 10m x 10m dalam tempoh 12 jam dengan 12 orang pembina perancah. Walaupun dengan tahap pasang surut astronomi terendah sebanyak 9.5 meter, struktur 10m x 10m x 10m di bawah platform, jika didirikan, akan tenggelam ke dalam air (lihat perenggan 94, 97–98).

(4) Mahkamah menerima penghujahan plaintif yang jumlah RM217,850 telah dibayar oleh plaintif untuk kerja-kerja yang tidak wujud dan/atau tidak dilakukan oleh D1. Balasan bagi kerja-kerja itu telah gagal keseluruhannya dan D1 telah memperkaya dirinya secara tidak adil untuk jumlah itu bagi kerja-kerja yang tidak dilaksanakan. Plaintif berhak kepada pembayaran balik wang yang dibayar kepada D1 kurang amaun caj buruh RM11,522.10 yang terhutang kepada D1. Atas imbangan kebarangkalian, plaintif telah membuktikan tuntutannya terhadap defendan. Walau bagaimanapun, D1 telah gagal membuktikan tuntutan balas terhadap plaintif (lihat perenggan 105, 107–108).]

Notes

For a case on breach, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2962.

Cases referred to

New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd New Hebrides (In Liquidation) [1987] 2 MLJ 57, SC (refd)

Royal Bank of Canada v Rex [1913] AC 283, PC (refd)

Teras Kimia Sdn Bhd v Kerajaan Malaysia [2014] 7 MLJ 584; [2013] CLJ 219, HC (refd)

Legislation referred to

Evidence Act 1950 s 73A(3)

P Gananathan (Olivia Loh, Gary Kuah and P Davindiran with him) (Gananathan Loh) for the plaintiff.

K Krishna Kumar (R Karnan with him) (Firdaus Azlina & Co) for the defendants.

Yeoh Wee Siam J:

THE PLAINTIFF'S CLAIM

[1] The plaintiff's claim in the original action is for the sum of RM206,327.90 that has been overpaid to the first defendant ('D1') for providing scaffolding services as stated in para 26 of the plaintiff's amended statement of claim.

[2] The plaintiff recognises that D1 did carry out some modification works which involve labour and is entitled to labour charges in the sum of RM11,522.10.

[3] The plaintiff seeks, inter alia:

(a) a declaratory order that RM100,000 is the only amount payable by the plaintiff to D1 in accordance with the purchase order ('PO');

(b) a declaratory order that D1 is only entitled to RM11,522.10 for labour charges; and

(c) a repayment of the sum of RM206,327.90 from D1.

[4] The plaintiff also claims damages against the defendants for fraudulent and false misrepresentation.

D1'S COUNTERCLAIM

[5] D1 in the original action denies the plaintiff's claim.

[6] D1 filed a counterclaim against the plaintiff for the sum of RM742,486.33 as at 21 September 2012, being the balance owed by the plaintiff for scaffolding services rendered by D1 as stated in para 36 of the amended statement of defence and counterclaim.

[7] D1's counterclaim is for payment in respect of the provision to the plaintiff of a scaffold structure of 2,000m plus an additional 64m structure.

BACKGROUND FACTS

[8] The project involved in this action is known as 'EPCIC ALLIANCE LNG REGASIFICATION UNIT, ISLAND BERTH AND SUBSEA PIPELINE OF THE LNG REGASIFICATION FACILITIES PROJECT' in Melaka ('the project').

[9] Perunding Ranhill Worley Sdn Bhd ('Ranhill') is the main contractor for the project.

[10] Ranhill appointed Maser Marine Engineering Sdn Bhd ('MME') as its subcontractor for the project.

[11] MME then appointed Stonehouse Construction ('Stonehouse'), trading as Dajejarhi ('the plaintiff'), as its subcontractor.

[12] The plaintiff then appointed D1 as one of its subcontractors to supply offshore scaffolding services for the installation of J-tubes and cables at the utility platform ('the platform').

[13] It is the plaintiff's case that D1 erected 400m of scaffolding which is more than the contractual estimate of +/- 200m .

[14] D1 alleged that it had erected 2,000m of scaffoldings (original estimate of 400m + additional 1,600m). D1 contended that the additional works were as a result of modification and this was agreed upon with the plaintiff as part of the variation orders ('VOs').

[15] When the plaintiff became aware that D1 did not erect the 2,000m scaffoldings as alleged, the plaintiff had already paid out to D1 a total sum of RM317,850, comprising:

(a) RM100,000 being the lump sum price for the original estimate of 400m as set out in the PO (CBOD2 Pt B pp 197–199); and

(b) RM217,850 towards D1's invoices for the alleged additional works ie Invoices Nos 003, 004, 005 and 006 specifically (CBOD2 Pt B pp 205–208).

[16] The plaintiff contended that the overpaid amount of RM217,850 was paid out based on the defendants' representations that they had erected a 2,000m scaffold structure.

[17] In the circumstances, the plaintiff seeks in this action, amongst others, for a refund of the sum of RM206,327.90 (after deduction of RM11,522.10 as labour services) and general damages against D1 and the second defendant ('D2') for the fraudulent and false misrepresentation.

ISSUES

[18] The issues to be decided by the court are:

(a) what are the agreed terms of contract entered into by the parties;

(b) whether the additional works carried out by D1 were agreed upon by both parties; and

(c) whether the plaintiff's claim and the D1's counterclaim can be allowed.

Evaluation and findings

(a) What are the agreed terms of the contract entered into by the parties

[19] D1's revised quotation to MME (and not to the plaintiff) dated 27 February 2012 (CBOD2 Pt B pp 200–202), inter alia, included the following:

Under Item 1	:	To supply 200/m of scaffolding. The estimate is 400m .
Under Item 3	:	Scaffolder: eight persons at RM420 per day.
Paragraph 15	:	'The above measurement are also based on final verification on the site measurement in event any of the measurement are increase from the original measurement it will be charged separately as VO works on the rate of agreeable as lump sum of our quotation ... '.

[20] The plaintiff responded to D1's revised quotation by issuing the purchase order ('PO') dated 1 March 2012 (CBOD2 Pt B pp 197–199) to D1. The 'Description' of the work is:

(1) Scaffolding service for J Tube & Cable Installation at Utility Platform

Pre-Delivery Inspection is Required

Marks & Tag is Required

QA/QC inspection is Required

Samples/Documentation is Required,

for the total value of order of RM100,000.

[21] The terms and conditions for purchase of goods and/or services at p 199 of the PO, inter alia, include the following:

Entire Agreement	1. The Seller hereby acknowledges that the following terms and conditions constitute the entire agreement between the Seller and the Buyer, and that no prior or subsequent representations or agreements, whether verbal or in writing by the Seller, its agents or servants shall be applicable or binding on the Buyer unless expressly agreed by the Buyer in writing.
Supply of Goods & Services	2. The Seller shall supply the goods and/or services described in this Purchase Order strictly in accordance with the terms and conditions and the Buyer's requirements as set out herein and no alteration shall be made thereto without the prior written consent of the Buyer.

[22] In cl 10 of the PO, it is stated that the 'rates and prices' listed in the PO 'are not subject to escalation in any manner whatsoever'.

[23] The PO constitutes the contract between the plaintiff and D1. The terms and conditions contained therein constitute the entire agreement between the two parties. Nowhere in the PO does it incorporate or adopt the contents of D1's revised quotation as part of its terms and conditions. Therefore, the PO has to be construed on its own terms without being bound by D1's proposal or terms in the revised quotation.

[24] It is noted that the PO does not contain any clause on variation of works. No fixed duration is provided in the PO.

[25] The plaintiff contended that it did not agree to D1's provision of 2,000m of scaffolding. Pursuant to the PO, the defendant was to provide only +/- 400m of scaffolding within eight days for a lump sum figure of RM100,000. The plaintiff did not agree to the alleged additional works of 1,600m provided by D1.

[26] Based on the above two terms of the PO, it is clear that D1, as the seller, shall supply the goods/services strictly in accordance with the terms and conditions of the PO, which means it is only for the total value of RM100,000. D1 was not allowed to make any alteration 'without the prior written consent of the buyer' ie the plaintiff.

(b) Whether the additional works carried out by D1 were agreed upon by both parties

(c) Whether the plaintiff's claim and D1's counterclaim can be allowed

[27] The question here is whether the original contract was varied, and if so, whether the plaintiff agreed to the variation in writing.

PE drawings are to be followed

[28] Prior to the commencement of the works by D1, D1 had engaged a professional engineer who prepared the PE endorsement design calculation and drawings dated 4 March 2012 ('PE drawing') (CBOD1 Pt B pp 49–62). The PE drawings contained the design of the original scaffolding structure that was to be erected by D1. It was the original structure which the plaintiff and D1 had contracted for.

[29] According to the second defendant ('D2') (DW1), the managing director of D1, the PE drawings are just a marketing tool. However, Mohamad Ridza bin lllias ('DW2'), one of the directors of D1, confirmed that PE drawings have to be complied with for the purpose of constructing the scaffolding structure.

[30] The court agrees with the plaintiff's contention and also accepts DW2's evidence that the PE drawings must be adhered to for the purpose of building the scaffolding, not only to ensure that the proper agreed structure is built, but also to ensure safety.

[31] However, along the way, D1 varied the PE drawings (CBOD6 Pt B pp 792–802). The defendants contended that the PE drawings were approved and duly acknowledged by Hanif bin Md Asnyat ('Hanif') (DW8). Hanif is not the plaintiff's employee or authorised agent. Hanif confirmed that he did initial p 797 of the amended PE drawings. In p 797 there were some handwritten notes stating that the size of the scaffolding built by D1 was 10m (H) x 10m (W) x 10m (L). Hanif did not know who wrote that on p 797.

[32] The court finds that Hanif was the site engineer and site representative of MME at the platform. He was involved in the preparation and completion of MME's offshore daily progress reports ('DPRs').

[33] Hanif signed the scaffolding request form (CBOD2 Pt B p 251) and scaffolding completion form (CBOD2 Pt B p 252) on 25 March 2012 (erection day) when he was requested to do so by D1's employee, Murali. At that time the scaffolding was not completed yet by D1. According to Hanif, the

scaffolding completion form was to record that erection works were in progress. When he signed the scaffolding completion form, Hanif was not on the platform, and he did not check the actual structure of the scaffolding.

[34] Hanif also signed the scaffolding joint inspection form (CBOD2 Pt B p 253). He signed it because D2 asked him to do so. D2 told Hanif that 2,000m of scaffoldings were erected. Hanif confirmed that he did not check the actual size of the scaffolding structure at the site when he signed this form. He was then on the barge. That was in April 2012, and Hanif was then busy monitoring the subsea cable installation works. Therefore, in effect, there was no joint inspection by Hanif. He signed the form solely at D2's request.

[35] Hanif admitted that it was his mistake to sign the above documents.

[36] The defendants further relied on all the manpower requisition forms (CBOD2 Pt B pp 242–245) that were signed by Hanif for modification and dismantling works, and inspection in an attempt to prove that modification and additional works were done for the scaffolding.

[37] Notwithstanding all of the above acts of Hanif, the fact remains that Hanif was an employee of MME, but not an employee of the plaintiff. There is no evidence that Hanif was the plaintiff's authorised agent to deal with D1. Therefore, the acts of Hanif cannot bind the plaintiff. The defendant cannot rely on Hanif's acts to contend that the plaintiff had agreed to the additional works done by the defendant.

[38] The question is whether the plaintiff and/or any of its authorised employees gave D1 prior written consent to carry out the additional works or variation works ('additional works').

[39] The defendants relied on what was agreed between D1 and the plaintiff's employees in the following meetings:

Meeting held on 29 March 2012

[40] Jaiprakash ('PW7'), the project manager for MME, was answerable to MME's project director, Tengku Izzat Zumari bin Tengku Sulaiman, for the project. PW7 was also authorised by MME to report directly to Brian Ticcioni (PW2) of the plaintiff, given that the members of the plaintiff's project team reported to Jaiprakash.

[41] The defendants alleged that in this meeting, D2 and Jaiprakash discussed the additional scaffolding services to be provided by D1. After the

meeting, D2 confirmed by an email dated 2 April 2012 (CBOD1 Pt B pp 85–86) the outcome of the meeting on agreed additional charges for 1,600m scaffolding that has been erected at the platform.

Meeting held on 7 April 2012

[42] D2 had another meeting with Mike Lambert, the plaintiff's construction manager, to obtain further confirmation that the defendant is allowed to impose the agreed additional charges for the extended period until the completion of the plaintiff's works scope at the platform. Thereafter, by an email dated 8 April 2012, D2 confirmed the outcome of the meeting (CBOD1 Pt B p 87).

Meeting held on 10 April 2012

[43] This meeting was held between the representatives of both parties to re-confirm the charges for the additional scaffolding to be provided by D1. Via an email dated 12 April 2012 (CBOD1 Pt B pp 88–89), D2 confirmed the outcome of the meeting.

Meeting on 5 May 2012

[44] D2 was called for a meeting by RE Venamurthy a/l Ramana ('PW3'), the plaintiff's deputy construction manager, to erect additional scaffoldings to extend the existing scaffolding below the platform to suit welding work.

[45] D2 via an email dated 6 May 2012 confirmed the agreement made between the two parties. D2 confirmed that risk level and lack of support have been studied and a support tower would be erected to extend the existing scaffoldings. D2 also informed Venamurthy that the final measurement would be confirmed upon completion of the required erection for further claims.

[46] However, the defendants did not adduce any evidence to prove that the persons named in the letters attended the meetings and the matters discussed.

[47] The defendants contended that on 8 May 2012, as requested by the plaintiff, D1 erected 64m of scaffoldings below the platform and invoiced the plaintiff accordingly.

[48] The court finds that pursuant to each of the four meetings above, it was D2 who followed up each meeting by an email to confirm that additional works were agreed to be done. It was a unilateral confirmation by the defendants of the additional works to be done for the scaffolding. Nowhere in

the documents produced in court were the defendants able to show proof that the plaintiff had given its consent in writing to the additional works to be done by D1.

[49] Jaiprakash ('PW7'), in his cross-examination, confirmed that only Mike Lambert knew what were the changes made to the design of the scaffolding during that period. Unfortunately, Mike Lambert was not called as a witness by either party.

[50] Under cross-examination, Jaiprakash said, 'All in all, I also did not want them to dismantle the scaffoldings and demobilise from the Project so I agree to the Payment'.

[51] However, it must be noted here that Jaiprakash is an employee of MME, and not the plaintiff, even though he reported to Brian Ticcioni ('PW1').

[52] The defendants relied on the decision in *Teras Kimia Sdn Bhd v Kerajaan Malaysia* [2014] 7 MLJ 584; [2013] CLJ 219 and submitted that the law relating to a binding contract is based on communications between the parties, both by word or conduct. 'The task before this Court therefore is to ascertain whether, on the basis of the correspondence as well as the conduct between the parties, a valid contract did, or did not subsist, during the interim period'.

[53] In the present case, I am of the view that the communications between the parties and their conduct must be considered in the light of the express term in the PO that 'no prior or subsequent representations or agreements, whether verbal or in writing by the Seller ... shall be applicable or binding on the Buyer unless expressly agreed by the Buyer in writing' and 'no alteration shall be made thereto without the prior written consent of the Buyer'.

[54] In the absence of any written consent or agreement by the plaintiff of the additional works done by D1, the plaintiff's claim ought to be allowed, and the defendant's counterclaim ought to be dismissed.

The daily progress reports ('DPRs')

[55] The defendants relied on the DPRs in particular on the DPR for 25 March 2012 (CBOD5 Pt B pp 358–364) in p 361 which, inter alia, recorded:

1900–2200	Scaffolding activities continue. Design has to be changed due to restriction in utilising concrete beams as support.

[56] D2 contended that when he arrived at the site on the morning of 25 March 2012, he discovered that the I-beams had been removed from the platform. The I-beams are to give support to the scaffolding.

[57] D2 then informed the plaintiff that the scaffolding structure required alteration from the original size of 2m width x 3m long x 7m high. The defendant proposed 10m width x 10m long x 10m high for the support tower above the platform and another 10m width x 10m long x 10 m high ('10m x 10m x 10m') for the lower working platform which will suit the plaintiff's work scope. According to D2, these changes were agreed upon by the plaintiff on the morning of 25 March 2012. D2 relied on the drawings in CBOD6 pp 792–802, but there is no document to prove the plaintiff's consent to the proposed changes to the scaffolding.

[58] Under cross-examination, Brian Ticcioni (PW2), the plaintiff's chief operating officer, did not dispute that there were no I-beams. However, this does not prove that he approved the additional works to be done by D1 necessitated by the absence of I-beam support at the platform.

[59] Hanif, who prepared this DPR, got the information in p 361 from the night shift personnel. He stated that Mike Lambert approved this report. Hanif did not highlight the contents of p 361 to Mike Lambert because he thought it was nothing. Thus, the defendants' reliance on the contents of p 361 to support their claim for additional works done cannot be allowed because p 361 does not contain the written consent of the plaintiff to the additional works even though the defendants had highlighted to the plaintiff the fact that more work had to be done in the absence of support from concrete I-beams.

The photographs

[60] The plaintiff relied on the photographs (CBOD3 Pt B pp 274–295) taken by an independent witness, Peter James Thomas Parkinson ('Parkinson') ('PW1') on various dates ie 25 March 2012, 29 March 2012, 28 April 2012, 30 April 2012, 6 May 2012, and 12–14 May 2012.

[61] Parkinson is the director of Global Explorer Sdn Bhd ('Global Explorer') which provided services in subsea cable installations. Global Explorer was appointed by the plaintiff to lay two power cables from the shore to the termination box at the platform.

[62] Parkinson testified that he often traveled to the platform during the period when the installation of the J-tubes, cables and termination boxes took place between March 2012–May 2012. During this time, he took photographs of the platform. He stated that, throughout the period, the size of the

scaffolding structure looked the same. He confirmed that the plaintiff's AutoCad drawing at p 327 best represents the scaffolding structure erected for the J-tube works.

[63] According to Parkinson, the scaffolding for the J-tube works were only required by MME's workers to reach below the platform in order to install the hang off clamp to the leg of the platform and to connect the J-tubes to the hang off clamps. Global Explorer did not require the use of scaffoldings. Parkinson further stated:

> I would say that the scaffolds shown in the photographs in CBOD Volume 3 (Part B) at pages 279 to 283, were sufficient for MME's workers to install the hang off clamp and subsequently install the J-Tubes to the hang off clamp. There is no requirement for such a huge structure on the top or below the platform.

[64] However, under cross-examination, Parkinson admitted that there were many other scaffolds erected for works on the platform by many other contractors. Thus, he was unable to say for sure whether the scaffolding shown in his photographs are the ones purportedly constructed by D1, or by other contractors. Parkinson also confirmed that he merely took the photographs but he would not be able to ascertain the volume of the scaffolding on the platform and below the platform.

[65] The court is therefore unable to rely on Parkinson's photographs to show the actual size of the scaffolding structure constructed by D1.

[66] The plaintiff further relied on the photographs taken by Ikhsan bin Ismail ('Ikhsan') (DW3). Ikhsan was the plaintiff's field engineer at the material time.

[67] On 13 June 2011 Ikhsan was instructed by Brian Ticconi (PW2) and Shaun Breeze to sign a statement (CBOD2 Pt B pp 258–267) for the period up to end of May 2012. In this statement, Ikhsan, confirmed that the four photographs (CBOD2 Pt B pp 259–262) were taken by him on 25 March 2012 and 29 March 2012 during and at the completion of D1's scaffold erection. He also confirmed that 'these, other than for minor modifications to comply with the client's requirements, do not deviate materially from the original MKRS engineer-certified design which was provided prior to the installation' and 'the drawing (Appendix C1) and calculation showing 2000 cubic meters ... in no way represent a true picture of the volume scaffolding erected. ... In fact Appendix C portrays a vastly inflated picture ...'.

[68] The court is unable to rely on the above evidence of Ikhsan on the photographs purportedly showing the size of the scaffolding structure

constructed by D1. This is mainly because, subsequent to the statement, Ikhsan, upon request by D2, made a statutory declaration on 9 July 2012 (CBOD4 Pt B pp 347–348) retracting the contents of his previous statement given to the plaintiff.

[69] Ikhsan confirmed that he was not in a position to confirm the volume of scaffolding services provided by D1.

[70] Fahmi bin Mohd Farid ('Fahmi') ('PW6'), the plaintiff's quantity surveyor, attended the joint inspection on 10 May 2012 to ascertain the size of the scaffolding structure. He saw a scaffolding structure that was small in size and he took photographs of the scaffolding structure (CBOD3 Pt B pp 313–316). According to Fahmi, the structure erected was not what was depicted in the two hand drawn sketches submitted by D2 (CBOD2 Pt B pp 256–257). When Fahmi later compared the photographs that he had taken with the photographs of the scaffoldings taken on 29 March 2012 (CBOD3 Pt B pp 297 and 304), the scaffolding structure in March 2012 and in May 2012 looked the same (see PW6WS Q & A 7). Fahmi knew that the photographs in pp 299–304, in particular in p 297, were taken on 29 March 2012 because that date is the same as the day for the installation of the J-tube, which is the clamp installation.

[71] Even though Fahmi did not personally inform D1 of his calculations of the volume of scaffolding at the material time, the calculations were communicated to D1 vide the plaintiff's letters dated 11 June 2012 and 10 August 2012 (CBOD1 Pt B pp 158–160).

[72] The defendants failed to rebut Fahmi's evidence that the photograph in p 297 was taken on 29 March 2012.

[73] The defendants did not produce a single photograph by way of evidence of the scaffolding constructed at the platform even though, according to Ikhsan's evidence, they could get permission from the client, Alliance, to bring in a camera to take photographs.

[74] Going by the photographs, the court finds that the ones taken by Fahmi are more reliable than the ones taken by Parkinson or Ikhsan. From Fahmi's photographs, it appears to the court that D1 did not build the scaffolding structure of 10m x 10m x 10m as alleged.

Expert evidence

[75] The plaintiff produced an independent expert witness, Neil Sharpe (PW5), to give evidence as per his expert report in exh NS2 attached to his

witness statement, PW5WS. Neil Sharpe, 44 years old, is the managing director of his own company, Sharpe Assoc Ltd. He has 25 years of work experience in the field of scaffolding and formwork, and has worked with various international companies in the scaffolding and formwork business.

[76] In brief, by applying different tests, Neil Sharpe came to the conclusion that D1 could not have constructed the scaffolding structure of 10m x 10m x 10m as claimed. The following evidence is considered by the court.

(i) Volume of scaffold structure and time for erection

[77] Neil Sharpe relied on the DPRs dated 25 March 2012 and 26 March 2012, where the actual erection time for both days is recorded as:

(a) 14 hours 5 minutes for the day; and

(b) 24 hours 14 minutes for the night.

[78] He then made a comparison between the actual erection time and the likely erection time in three scenarios as shown in the plaintiff's AutoCad drawings:

(a) the scaffold structure reproduced based on the plaintiff's photographs, being the scaffold that was erected for the project — *Scaffold Case 1* (CBOD3 Pt B p 326; exh NS2, sheet 4);

(b) the scaffold structure reproduced based on the original design in the PE drawings, being the scaffold that was proposed to be erected for the project — *Scaffold Case 2* (CBOD3 Pt B p 327; exh NS2 sheet 5); and

(c) the scaffold structure reproduced based on D2's hand drawn sketch, being the scaffold that was said to be erected for the project — *Scaffold Case 3* (CBOD3 Pt B p 328; exh NS2 sheet 6).

Neil Sharpe's calculations for volume are as follows:

(i) Scaffold Case 1	—	167.17m
(ii) Scaffold Case 2	—	213m ; and
(iii) Scaffold Case 3	—	1,755m .

[79] Neil Sharpe's calculation of actual erection time shows that with the likely erection time required to build each of the Scaffold Cases, it is impossible to build a structure of 2,000m within that limited time and with the resources. He concluded that it was possible to build the scaffold in Scaffold Case 1 and

Scaffold Case 2 within the actual erection time, but it was not possible to build the scaffold in Scaffold Case 3 within the actual erection time. A structure of this significance would require 406 hours and 16 minutes or approximately 16 days to complete.

[80] Neil Sharpe also carried out an assessment of the erection production rate set against the actual erection time for the same three scenarios and concluded that while it is achievable to erect the scaffold in Scaffold Case 1 and Scaffold Case 2, for Scaffold Case 3, the daytime production rate is 66.43m per hour and the right time production rate is 33.22m per hour. Based on Neil Sharpe's assessment, such production rate is humanly not achievable.

(iii) Inadequate scaffold materials

[81] It is not disputed that there was only one shipment of materials that were actually delivered to the site. The quantity is based on D1's packing list dated 6 March 2012 (CBOD4 Pt B p 336; exh WS2, sheets 7–10).

[82] By a comparison of the quantity of materials delivered to the site against the necessary materials required in each Scaffold Case, Neil Sharpe concluded that the amount of scaffold equipment delivered is more than adequate to build the scaffold in Scaffold Case 1 and Scaffold Case 2, but is inadequate to build the scaffold in Scaffold Case 3.

[83] Under cross-examination, based on sheet 7 of exh NS2, Neil Sharpe was not able to confirm what would be the maximum amount of m volume of scaffoldings that could be erected. If Neil Sharpe was able to answer the question, that would assist the court to find out the maximum size of the scaffold structure that can be built. Be that as it may, such a question in cross-examination does not disprove what Neil Sharpe had concluded, that the materials delivered were not adequate to build the scaffold which D1 alleged to have built.

No expert evidence from the defendants

[84] D1 did not call any independent expert to give evidence on its behalf. D1 merely depended on the evidence of D2. D2, 36 years old, derived his evidence from his own records and personal knowledge. He has a Double Master in MBA and M Sc. He is a qualified trainer with Construction Industry Development Board ('CIDB'), Department of Occupational Safety and Health ('DOSH'), and National Institute of Occupational Safety and Health ('NIOSH'). D2 is the President of the Malaysian Occupational Scaffolding Association ('MOSA'). He has been with D1 for more than ten years. One of the principal activities of D1 is to provide scaffolding.

[85] Contrary to what Neil Sharpe had concluded, D2 stated that he was able to build the scaffold with his materials. He contended that he used a one to one standard with a six metre gap ie from one tube to another, whereas Neil Sharpe was using a two metre standard. D2 contended that he only required three standards of a six metre length and four metre high to create a 10m x 10m x 10m structure. Thus, D2 did not need such a huge amount of materials to erect the scaffold. He contended that it is humanly possible with the manpower of 12 scaffolders to erect 2,000m in the 12 hours at the platform by using his erection method or technique.

[86] Section 73A(3) of the Evidence Act 1950 provides:

> Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated, involving a dispute as to any fact which the statement might tend to establish.

[87] D2 is an interested party in these proceedings. Thus, his document in exh B5 of his witness statement, DW1WS2, cannot be admitted as expert evidence under s 73A of the Evidence Act. In exh B5, D2 attempted to explain how D1 carried out the erection of 2,000m scaffoldings allegedly with 12 scaffolders in 12 hours, all in one day. This document was prepared by D2 after he had sight of Neil Sharpe's expert report, when proceedings were still on. It is not a contemporaneous document.

[88] In the absence of an expert report being adduced by the defendants, the court accepts the plaintiff's expert report prepared by Neil Sharpe.

[89] In any case, as submitted by counsel for the plaintiff, D2's evidence is highly inconsistent with contemporaneous documents and records such as:

(a) the contemporaneous DPRs record that erection works were undertaken on 25 February 2012 (three scaffolders for the day and six scaffolders for the night) and on 26 March 2012 (two scaffolders for the day and two scaffolders for the night) (CBOD5 Pt B pp 362 and 369);

(b) the DPR on 25 March 2012 also records that the scaffolding erection works commenced only at 1600 hours (4pm) (CBOD5 Pt B p 360); and

(c) the DPR on 26 March 2012 states that the scaffolding erection works were still progressing for completion and were only completed at 2200 hours (10pm) (CBOD5 Pt B p 367).

[90] The contents of the DPRs have not been challenged by the defendants.

[91] The defendant's own scaffolding completion form (CBOD2 Pt B p 252) records the commencement of erection works at 1700 hours (5pm) and completion of works on 26 March 2012. This is consistent with the recordings in the DPRs.

[92] D2 claimed that D1 used 12 scaffolders to erect the scaffold. However, this is inconsistent with D1's own contemporaneous documents:

(a) in D1's quotation of 27 February 2012 (CBOD2 Pt B pp 200–202), D1 offered eight scaffolders to build a scaffold of 400m ;

(b) on 20 March 2012, D1 allocated eight scaffolders to attend to the works (CBOD1 Pt B p 74); and

(c) by an email dated 2 April 2012 from D2 to Jaiprakash (PW7), D2 claimed that seven scaffolders and one supervisor were on standby for erection works (CBOD1 Pt B p 85).

[93] From the documents, it is clear that there were originally eight scaffolders. In court, D2 gave oral evidence that 12 scaffolders had carried out the erection works. There is no documentary evidence that there were 12 scaffolders on the platform on 25 March 2012 doing the erection works.

[94] From the totality of the evidence adduced, it is not credible that the defendants were able to come up with a design which is technically complex for such a huge structure within minutes when D2 arrived at the platform on 25 March 3012.

[95] The court does not accept the defendants' version of events that D1 had erected and completed the huge and complex structure of 10m x 10m x 10m on 25 March 2012 within 12 hours with 12 scaffolders.

[96] On the other hand, the court accepts the plaintiff's contention that D1 took two days to complete the erection on 25–26 March 2012 with a limited number of scaffolders for a scaffold structure which is of a much smaller size, which is the one that the plaintiff had contracted for with D1.

Submergence of the scaffold underwater

[97] The court is unable to accept the evidence of Ainor Syahril ('PW4') who stated that the distance between the concrete slab on the platform to the sea level is 12 metres. Ainor Shahril did not support what he said with documentary evidence. He qualified his answer by saying that the distance is 'Depending on the tide'. He was not sure how to get exact figures.

[98] On the other hand, the court accepts the explanation given by the expert witness, Neil Sharpe ('PW5'). Based on that, the court agrees with the plaintiff's submission that even with the lowest astronomical tide level of 9.5metres, the 10m x 10m x 10m structure beneath the platform, if erected, would have submerged into the water.

[99] Ainor Shahril informed the court that any structure beneath the sea requires a permit from the project management team ('PMT') of the alliance consisting of Ranhill and Muhibbah Engineering (M) Sdn Bhd, amongst others. PW4 testified that no such permit was issued to D1.

[100] D2 conceded that none of his scaffolders are qualified divers to erect a structure in the sea.

[101] Taking into account the evidence of the plaintiff on all the impossibilities of D1 constructing the 2,000m structure, the court holds that D1 is unable to prove its counterclaim against the plaintiff.

Green tag inspection

[102] The purpose of a weekly green tag inspection is to ensure the safety of the scaffolding structure. The defendant made efforts to secure the attendance of Yuvarajan, the alliance scaffolding inspector, but could not locate him. Since Yuvarajan did not come to court as a witness to tender his statutory declaration (ID-D2), the document cannot be admitted as an exhibit. Therefore, the defendants cannot rely on the contents of ID-D2 to support their contention that 2,000m of scaffolding was erected by D1. In any case, Yuvarajan's testimony would be regarding the green tag inspection on the safety of the scaffolding, and he cannot be accepted as an expert to give evidence on the volume of scaffolding erected.

Whether there is fraudulent and false misrepresentation

[103] The plaintiff is unable to prove beyond reasonable doubt that the defendants committed fraudulent and false misrepresentation against the plaintiff. In fact, the various emails sent by D2 to the plaintiff's various employees after the four meetings, which I had enumerated earlier in this judgment, show that all times the defendants sought confirmation from the plaintiff for additional works to be done and for additional payments to be made. Throughout, the plaintiff was aware of what D1 was proposing in terms of additional works or variation works to be done. It is to D1's detriment that the plaintiff chose not to confirm in writing consenting to the additional works or variation works to be done by D1.

[104] Due to the lack of cogent evidence adduced by the plaintiff on fraudulent and false misrepresentation by the defendants, the court holds that the plaintiff is not entitled to damages for the same.

Monies had and received

[105] The court accepts the plaintiff's submission that the sum of RM217,850 was paid by the plaintiff for works that did not exist and/or were not carried out by D1. The consideration for these works has wholly failed and D1 has unjustly enriched itself to this sum for works it did not execute.

[106] In *New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd New Hebrides (In Liquidation)* [1987] 2 MLJ 57, the Supreme Court adopted the common law principle of 'moneys had and received' as stated in *Royal Bank of Canada v Rex* [1913] AC 283 where the court held as follows:

> It is a well established principle of the English common law that when money had been received by one person which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover as money had and received to his use.

[107] The court holds that the plaintiff is entitled to the repayment of the monies paid out to D1 less the amount of labour charges of RM11,522.10 which is owed to D1.

DECISION

[108] Based on the above considerations, on a balance of probabilities, the court finds that the plaintiff has proved its claim against the defendants. However, D1 has failed to prove its counterclaim against the plaintiff.

[109] Accordingly, the court orders as follows:

(a) the plaintiff's claim is allowed. Costs of RM10,000 are to be paid by the defendants jointly to the plaintiff; and

(b) D1's counterclaim is dismissed. Costs of RM10,000 are to be paid by D1 to the plaintiff.

Claim allowed and counterclaim dismissed with costs.

Reported by Afiq Mohamad Noor